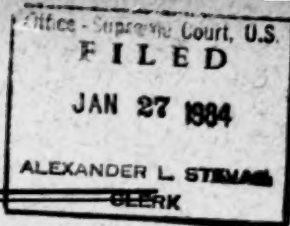


No. 83-844



In the Supreme Court of the United States

OCTOBER TERM, 1983

JACK D. CHERUBINI, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his acts of voter fraud did not violate the mail fraud statute, 18 U.S.C. 1341.

1. After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on eight counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent prison terms of six months and fined \$1000 on each count. In addition, he was placed on probation for three years. The court of appeals affirmed by judgment order (Pet. App. 8a-10a).

The evidence at trial showed that at the time of the events in this case petitioner was the Chief Building Inspector in Union City, New Jersey (Tr. 163).¹ He also held the position of Election Judge, in which capacity he had responsibility

¹"Tr." refers to the transcript of trial.

for overseeing a particular polling district and ensuring the integrity of the election (Tr. 27, 58-59).

On April 7, 1981, the Union City Board of Education conducted an election for Board members (Tr. 54). Three of the candidates for these positions were sponsored by a political group called "Y.O.U.," or "Your Operation Uplift" (Tr. 57). Y.O.U. made an "all out effort" to obtain absentee votes for its candidates (*ibid.*). As a member of Y.O.U., petitioner solicited approximately 28 absentee ballots (Tr. 265, 324), eight of which were the subject of the indictment in this case. In each instance, petitioner solicited the signature of the voter on a blank ballot and certification, marked the ballot for Y.O.U.'s candidates, and mailed the completed ballot to the Hudson County Board of Elections (see, e.g., Tr. 74-76, 79, 80, 139-140, 145-146, 184, 185, 187).

Petitioner had each of the alleged absentees certify that he had "marked the enclosed ballot in secret," as required by the ballot and certification (C.A. App. 20A), thereby misrepresenting to election officials that this statutory requirement had been met. See N.J. Stat. Ann. § 19:57-19 (West Cum. Supp. 1983). In addition, the absentee ballot application required the absentee to indicate that he was "unable to vote at [his] regular polling place on election day" for one of several enumerated reasons that the applicant could check on the form (C.A. App. 18A). In each instance petitioner completed this section after the form had been signed, despite the fact that the stated reasons for voting by absentee ballot did not apply (see, e.g., Tr. 72-73, 119, 120, 191).

2. Petitioner contends, on several grounds, that the mail fraud statute does not reach his acts of voter fraud. Each of petitioner's arguments is without merit.

a. First, petitioner argues that the mail fraud statute is inapplicable here because his misconduct was a "purely local matter" (Pet. 17) and a "*de minimis* violation of New

Jersey law" (Pet. 15). However, it is well settled that the purpose of the mail fraud statute is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of the exact nature of the scheme or whether the scheme is forbidden by state law.² See *Parr v. United States*, 363 U.S. 370, 389, 390 (1960). As the Court stated in *Badders v. United States*, 240 U.S. 391, 393 (1916) (citations omitted):

The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.

Accordingly, the government could have employed the mail fraud statute to punish petitioner's fraudulent misconduct — which was clearly contrary to public policy — even if New Jersey had chosen not to criminalize voter fraud at all. Indeed, Section 1341 punishes use of the mails in furtherance of "any scheme or artifice to defraud" (emphasis added).

b. Next, petitioner contends (Pet. 15-16) that his acts of voter fraud did not violate the mail fraud statute because the ballots could have been delivered to the Board of Elections by means other than the mail. But if petitioner's reading of the mail fraud statute were correct, then almost every mail fraud prosecution would be defeated. As the

²Mail fraud is in this respect materially different from offenses such as that described in the Travel Act, 18 U.S.C. 1952, which derive from Congress's power under the Commerce Clause, are meant to supplement state law enforcement, and are keyed to the presence of independently unlawful activity. Accordingly, petitioner's reliance on *Rewis v. United States*, 401 U.S. 808 (1971), a Travel Act prosecution, is unfounded.

Fourth Circuit stated in *United States v. Caldwell*, 544 F.2d 691, 696 (4th Cir. 1976), "[i]t matters not, as defendant argues, that payment could have been accomplished in some other manner — defendant suggests by dog sled"; rather, "[a]ll that is needed is proof that the mails played a significant part in execution of the scheme." See also *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976). Cf. *Pereira v. United States*, 347 U.S. 1, 8 (1954) ("[i]t is not necessary that the scheme contemplate the use of the mails as an essential element"). Here, there is no doubt that delivery of the absentee ballots to the proper officials so that they would be counted was a "significant part" of petitioner's fraudulent scheme.

c. The theory of petitioner's mail fraud prosecution was that by his conduct he had "defraud[ed] the citizens of Union City of their right to have the April 7, 1981, Union City Board of Education election conducted fairly and impartially and without fraudulent absentee ballots" (C.A. App. 5A). Petitioner contends (Pet. 18-25) that the mail fraud statute reaches only schemes to secure money or property by fraud, and not ones having as their sole object the deprivation of political and civil rights of the general citizenry. But by its plain terms Section 1341 prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" (emphasis added). "[T]he prohibition against schemes or artifices to defraud is properly interpreted to be independent of the clause 'for obtaining money or property.'" *United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), cert. denied, No. 82-1126 (May 2, 1983). See *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974). The use of the mails to transmit fraudulent misrepresentations in an effort to have illegally cast ballots counted in an election plainly comes within the core prohibitions of the statute.

d. Finally, petitioner argues (Pet. 25-28) that he owed no fiduciary duty to the citizens of Union County with respect to the conduct for which he was prosecuted. He appears to take this position on the basis that neither as Chief Building Inspector nor as Election Judge did he have responsibility for the dissemination or control of absentee ballots.

But whether petitioner owed a fiduciary duty is a question irrelevant to this case. This is not a case where the offense depends on proof that petitioner violated "an affirmative duty to disclose material information coupled with a breach of fiduciary duty." *United States v. Margiotta*, 688 F.2d at 129; *id.* at 139 (Winter, J., dissenting); *United States v. Mandel*, 591 F.2d 1347, 1362-1364 (4th Cir.), *aff'd en banc*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (1980). On the contrary, petitioner committed mail fraud by the affirmative act of filling out and mailing false absentee ballots — an act that would be fraudulent whether or not committed by an officeholder. *United States v. States*, *supra* (absentee ballot fraud by candidates). Cf. *United States v. Condolon*, 600 F.2d 7, 8 (4th Cir. 1979) ("[t]he fraudulent scheme need not be designed to obtain money or property, nor need it involve the breach of a fiduciary relationship"); *United States v. Louderman*, 576 F.2d 1383, 1387 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978).³

³Moreover, even if proof of a fiduciary duty were required to sustain petitioner's conviction, it was amply supplied by the evidence in this case. At trial the secretary of the Board of Elections, which appointed petitioner to the position of Election Judge (Tr. 50), testified (Tr. 58-59) that an Election Judge

is responsible for conducting the election in that specific election district. He is responsible for the integrity of the election there * * *. He supervises the other Election Board workers and generally has the powers of — to — if there is questions as to voters, to ask them for identification, to ask them information necessary to determine whether they should vote or not, their residence, any type of identification and generally administer the election rules.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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Accordingly, even if we assume that petitioner's duties as Election Judge did not include supervision of absentee ballots, it cannot seriously be disputed that, having had responsibility for ensuring "the integrity" of the election in his district, he breached his fiduciary duty when he failed to disclose facts that would have affected the legitimacy of numerous absentee ballots. See *United States v. Barta*, 635 F.2d 999, 1007 (2d Cir. 1980) (employer-employee "relationship, by itself, may oblige an employee not to conceal, and in fact to reveal, information he has reason to believe is material to the conduct of his employer's business"). Beyond that, the evidence showed that petitioner used his leverage as Chief Building Inspector to obtain at least some of the absentee votes (Tr. 80, 120-121, 152-153).